

# Threatened species legislation: Does it work for local communities or Local Government?

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## ABSTRACT

The paper examines the Commonwealth and New South Wales threatened species legislation from the perspective of local communities and a local government seeking to protect threatened species. Both the Commonwealth and State legislation are identified potentially to be useful tools, providing ample opportunities for involvement in protecting threatened species and ecological communities and their habitats. However, groups and individuals in the community who have an interest in conserving these key elements of unique natural environments are disengaging. Ministerial discretion is undermining commitment to the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999* and the NSW *Threatened Species Conservation Act 1995*.

Local Governments, faced with a growing suite of State and Commonwealth demands, have scarcely begun to engage with Commonwealth threatened species legislation, even though Matters of National Environmental Significance addressed by the Commonwealth legislation may be locally relevant.

The protection of endangered species, ecological communities and populations on North Head at Manly is used to highlight some of these concerns as they relate to both Commonwealth and State threatened species legislation. The paper concludes with a call for stronger partnerships between scientists, local government, local communities and the environment movement, to bring governments to greater accountability in using the existing legislation to protect Australia's unique biodiversity, some of which has an iconic status locally.

**Key words:** Threatened species, community action, Local Government role, legislative opportunities, Ministerial discretion

## Introduction

This paper draws on the author's experience as a Ministerial Consultant during the development and introduction of the former Commonwealth *Endangered Species Protection Act 1992*, and with the Environmental Defenders' Office staff during the passage of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act). The author also draws on experience as one of the leaders of a multi-stakeholder project directed to improved management of the endangered Grassy White Box Woodlands on the western slopes of New South Wales, as an elected local representative (i.e. a councillor) on Manly Council, and as a foundation member of the North Head Sanctuary Foundation.

The North Head Sanctuary Foundation is a community-based not-for-profit organisation whose members include scientists and other professionals working side-by-side with community members with expertise in research, education, and other aspects of natural, Aboriginal, built and cultural heritage. The Foundation was formed in 2002 with the purpose of securing a publicly-owned sanctuary of national significance across the whole of North Head, managed predominantly as a protected environment to conserve its natural attributes, while at the same time celebrating the Aboriginal, immigration and military heritage of this spectacular place, and providing opportunities for learning, research and contemplation.

North Head, at the gateway to Sydney Harbour, is a place of outstanding natural and cultural heritage. It is a tied island largely surrounded by spectacular seacliffs up to 60 metres high and by flooded river valleys. Past uses as a Defence training area and as Australia's oldest and longest serving Quarantine Station have ensured that some of the most extensive and intact tracts of heath and scrubland around Sydney Harbour are found there. The North Head area provides refuge for artificially disjunct species, remnant populations and ecological communities displaced by urbanisation and now recognised as endangered. These natural values, together with its built and cultural heritage associated with its immigration, quarantine and military history see the whole of North Head listed on the Register of the National Estate.

Experiences with North Head and elsewhere indicate that both Commonwealth and State threatened species legislation deserve the label 'a curate's egg' i.e. good in parts. Whether viewed from the perspective of a community advocate for threatened species, a former government policy adviser, or an elected Local Government representative, the Commonwealth and New South Wales Acts are each in part good in protecting threatened species, but they are also deficient in several ways.

## What Commonwealth legislation has to offer

It is useful, when considering community and Local Government perspectives, to begin with the Commonwealth legislation directed to threatened species conservation.

Through a process of referral, assessment and approval, the *EPBC Act 1999* gives the Commonwealth powers to act on any of seven Matters of National Environment Significance, namely to protect World Heritage properties, wetlands of international significance, species and ecological communities listed as threatened at a national level, listed migratory species, the environment in Commonwealth marine areas, the environment in relation to nuclear actions (including uranium mining), and more recently items of national heritage significance.

A recent review of the Commonwealth-funded Environment Protection and Biodiversity Conservation (EPBC) Unit, done for a community sector client by the author's consultancy business Community Solutions (Lambert *et al.* 2003), clearly highlighted the extent to which the merits of legislation and community willingness to engage with that legislation depend hugely on the will of governments to implement it.

The threatened species aspects of the *Environment Protection and Biodiversity Conservation (EPBC) Act 1999* are potentially quite powerful. The opportunities for community action are numerous, and can be summarised as follows:

- bring actions to the attention of the Minister for Environment and Heritage if they are considered likely to have a significant impact on aspects of the environment, including nationally listed threatened species. Although not formally able to 'refer' matters to the Minister in this process, anyone can ask the Minister to have a project proponent refer an activity for consideration, and community members can also play an important role in scrutinising and commenting on the information provided by a project proponent when they are referring an action to the Minister.
- lobby for a higher level of assessment of any action determined to be a 'controlled action', and make input to Public Environment Reports, Environmental Impact Statements and Public Inquiries triggered by the Minister in relation to 'controlled actions'
- nominate a species or ecological community for listing under the Act
- nominate Key Threatening Processes (e.g. Predation by Feral Cats, Clearing of Native Vegetation), which must be addressed by a Threat Abatement Plan made under the Act
- make representations in relation to the identification of Critical Habitat for a species listed under the Act
- make representations to the Compliance and Enforcement Unit in relation to any perceived breaches of the Act
- in particular circumstances (with 'standing'), take legal action to have the Act enforced

However Ministerial discretion within the Act, and the extent to which the Federal Minister for the Environment has chosen not to use the Act to its full potential or to respond to community representations, are doing much to discredit this legislation. Community sector responses provided during a recent review of services provided by the community-based EPBC Unit (Lambert, Elix and Pearce 2003) reveal a perception of limited usefulness in engaging with the Act. Lack of adequate knowledge and understanding of the Act, lack of resources, cynicism about the effectiveness of the Act in protecting the environment, failure to perceive opportunities to use the Act to protect the environment, and lack of confidence in engaging with the legislative and policy process were all significant factors cited as reasons for a relative lack of community engagement. Environmental non-government organisations and local communities are beginning to disengage – they simply are not willing to invest the time, effort and resources needed to get nominations accepted, seek redress for breaches of the Act, or make referrals under the provisions of the Act if there is no demonstrated political will to act on those representations.

Despite numerous referrals, the Commonwealth only initiated its first enforcement action under the Act three years after the legislation came into force. The *Minister v. Greentree* case heard in the Federal Court of Australia (2003) addressed an issue of impacts on wetlands of international significance.

The Australian National Audit Office in its Audit Report in April 2003 (ANAO 2003), in its performance audit of Environment Australia's<sup>1</sup> administration of the *EPBC Act 1999*, highlighted the areas which are causing community concern.

Of the 603 actions referred to the Minister as 'likely to have a significant impact on the environment', only 29% (175 actions) became 'controlled actions' requiring Ministerial approval, and at the time of the Audit Report 34 of these had been approved, and none refused.

Monitoring and enforcement of compliance with the Act were identified by the Audit Report as being "crucial to the effective operation of the Act", but were described as "still being at an early stage" and "not ideal". Environment Australia's<sup>1</sup> responses to potential breaches of the Act were described as "less than robust".

While the examples of lack of commitment are numerous, perhaps one of the most notorious examples of this lack of robustness is the approval recently given for the Portman iron ore mine expansion at Koolyanobbing in WA. There the Federal Minister approved a development which his own media release (Kemp 2003) at the time of the approval, acknowledged will result in an initial destruction of 30% of individual plants of the endangered species *Tetratheca paynterae*, with a further 20% likely to be affected later.

Precedents like this cause community members working for the conservation of North Head and its endangered species and ecological communities to question the

<sup>1</sup> Environment Australia is the former title for the Commonwealth Department of Environment & Heritage.

robustness of a Ministerial determination that the proposed Mawland Hotel development at the North Head Quarantine Station is “highly unlikely” to have a “significant impact” on nationally listed flora in the area. The determination is apparently based on a commitment by the development proponent to avoid all threatened species and the ecological community within the lease area (Wilmot 2002). This is of particular concern when the proponent of the Mawland hotel development is seeking the right to remove a section of endangered Eastern Suburbs Banksia Scrub through an offsetting process.

Similarly, although the endangered status of the East Coast population of Grey Nurse Shark *Carcharias taurus* was upgraded from ‘vulnerable’ to ‘critically endangered’ during 2001 because of a “very severe reduction in population size due to impacts such as fishing”, a 20 February 2002 referral to the Federal Minister seeking consideration of the likely impacts of the Mawland Hotel development and associated works on the adjoining Aquatic Reserve which is a potential nursery area for this species was, by 27 February 2002, determined not to be a ‘controlled action’ requiring approval under the EPBC Act (Mercer 2002).

However, all is not negative at the Commonwealth level. In the *Minister v. Greentree* case the Federal Minister for the Environment has successfully taken action in the Federal Court to restrain land clearing in RAMSAR listed wetlands (Federal Court of Australia 2003).

Third party standing provisions, and the removal of the requirement to give an undertaking as to damages under the EPBC Act, do enable community groups to take action. The potential for outcomes is demonstrated by one notable case - the *Booth v. Bosworth* Spectacled Flying Fox *Pteropus conspicillatus* case in the Federal Court (Federal Court of Australia 2000). While this case focused on World Heritage (rather than Threatened Species) as a Matter of National Environmental Significance, the result was the granting of a permanent injunction protecting the Spectacled Flying Foxes within the Wet Tropics World Heritage Area against culling by electric grid. In handing down his judgment Justice Branson said “*In weighing the factors which support an exercise of the Court’s discretion in favour of granting an injunction... it would be a rare case in which a Court could be satisfied that the financial interests of private individuals, or even the interests of a local community, should prevail over interests recognised by the international community and the Parliament of Australia as being of international importance.*” (para.115)

That the Courts offer a greater opportunity for community action to protect threatened species than does direct referral to the Federal Minister is reinforced by a second case brought by the Humane Society International (Australia). In this case the Grey-headed Flying Fox *Pteropus poliocephalus*, which is listed nationally as vulnerable to extinction and which the Federal Minister thus has responsibilities to protect, was protected from culling through the Court (Federal Court of Australia 2003).

The Commonwealth, in the early stages of the legislation, demonstrated its willingness to list threatened ecological communities. Grassy White Box Woodlands received Commonwealth listing before it was listed in NSW. The former Federal Minister for the Environment, Robert Hill, also showed courage in the face of hostile landholder reaction, when he listed Queensland’s Brigalow Woodlands and the Bluegrass Grasslands in April 2001. However, that courage, like other aspects of the application of the EPBC Act, has since evaporated. More recently Minister Kemp has listed only two new ecological communities in more than two years as Environment Minister. This despite the fact that there are over 500 threatened ecological communities listed in the States and Territories and 2891 “threatened assemblages” identified in the Terrestrial Biodiversity Assessment completed nationally in 2002 (National Land & Water Resources Audit 2002). Even the public nominations submitted by community groups are processed slowly, and the Minister has fallen behind in meeting statutory deadlines (10 days to Scientific Committee, Scientific Committee advice to Minister within 12 months, Ministerial decision within 90 days after advice).

## Local Government & the EPBC Act 1999

If community-based environmentalists are disengaging with Commonwealth threatened species legislation, then Local Government has never engaged. That the EPBC Act has scarcely reached the consciousness of many working in Local Governments is reflected in the comment from one committed Local Government Sustainability Officer who said recently at interview (Lambert, Elix and Pearce, 2003) “*I hardly even know about the EPBC Act, let alone using it.*”

Threatened species protection responsibilities arising out of Commonwealth legislation that seems remote from their day-to-day operations are not a high priority for Local Governments faced with ever-growing demands resulting from Commonwealth and State policy and legislation. This situation is exacerbated by a lack of commensurate increase in resourcing from the higher levels of government.

Not so long ago the focus of Local Government responsibilities could be summed up in the ‘roads, rates & rubbish’ catch-cry. Nowadays Local Government plays an increased role in issues as diverse as environmental management, protection of the built and natural environment, town planning and development controls, housing and welfare, waste and recycling, public health and safety, and provision of recreational, educational and cultural services, among others. Each of these functions brings with it substantial cost, but while in 1975 State Government funding for Local Government in NSW averaged 14.8% of the total expenditure by Local Governments, by 1998 that had fallen to 7.1% (Hale 2003). When this is matched with substantially increased charges to Local Government for Bushfire control, waste disposal and other activities, and in NSW rate-capping which seriously constrains Local Government’s revenue-generating capacity, it is not unexpected that Local Government has not generally engaged with a piece of legislation which has not yet demonstrated its relevance to them.

Many in the community expect the Commonwealth legislation to serve as the flagship or role model nationally, so it is not surprising that in the recent review of the EPBC Unit and its work (Lambert *et al.* 2003), respondents from State agencies in several States and from the community were cynical about the future, or focused on State, rather than Commonwealth legislation to protect threatened species and ecological communities.

## Protecting species, populations and ecological communities in New South Wales

In moving on to look at the *NSW Threatened Species Conservation Act 1995* (the TSC Act), as amended in 2003, this paper uses as a case study, community and Local Government experiences. In particular the work of a local community and its Local Government to conserve the flora and fauna of North Head, Sydney and its surrounding seas are examined.

The northern headland at the entrance to Sydney Harbour, North Head, east and south of the historic stone wall which defines its landward boundary, is an area of some 300 ha, all of which is public land under the care and control of State and/or Commonwealth authorities.

Although there is as yet no published comprehensive flora and fauna study of North Head, the area is known to be home to species, populations and ecological communities listed as vulnerable or endangered under the provisions of the TSC Act 1995. Listed are

- Endangered Populations of the Long-nosed Bandicoot *Perameles nasula*, and the Little Penguin *Eudyptula minor*
- the Endangered Eastern Suburbs Banksia Scrub Ecological Community
- the Endangered sub-species of Sunshine Wattle *Acacia terminalis ssp terminalis*
- the Vulnerable species – Camfields Stringybark *Eucalyptus camfieldii* and the Powerful Owl *Ninox strenua*

Several rare plant species are also recorded from North Head.

## How well has the Threatened Species Conservation Act served these population, ecological communities, and species?

### Little Penguins

The Little Penguin *Eudyptula minor* population in the northern parts of Sydney Harbour is the only known breeding colony on the mainland in NSW. After considerable community action, it was listed as an Endangered Population in January 1997. A Recovery Plan was put in place in October 2000, and after further investigation, public consultation, and numerous representations by Manly Council and community members, Critical Habitat for the penguin population was declared in January 2003 (NSW NPWS Jan 2003).

Although Little Penguins are reported to have been present in their hundreds in the North Harbour area in the past, recent NPWS information (NSW NPWS 2003), based on a comprehensive monitoring program, indicates that the population has been “dramatically decreased to around 60 breeding pairs... Numbers are now so low that the population is in danger of becoming extinct”.

Yet still, there are activities being approved which further place at risk the future of both this population, and of the endangered Long-nosed Bandicoot population. These activities receive increased public attention since the Little Penguin and the Long-nosed Bandicoot have achieved something of an iconic status for the natural environment of North Head.

A Commission of Inquiry into the proposed Mawland Hotel development at the North Head Quarantine Station (Office of the Commissioners of Inquiry 2002) recommended that proposed ferry movements to and from the Quarantine Station wharf (in the heart of the Little Penguin nesting and rafting area, the Wharf lying within the declared Critical Habitat area) should be the subject of a blanket dusk to dawn curfew, so as to avoid impacts on the penguins as they are coming ashore to feed their young. However, in what appears to be a trade-off between protection of endangered populations of Little Penguins and Long-nosed Bandicoots, and with strong focus on the commercial operations of the proposed Mawland development, approval has been given for the ferries to operate to and from the Quarantine Wharf until 11pm each night. As Little Penguins generally raft together and come ashore within approximately one hour of sunset, this ferry operation will cease far too late to offer any meaningful protection.

More recently, as part of the declaration of Critical Habitat, marker buoys have been installed, defining the 50 metre offshore line beyond which anchoring is not permitted during the Little Penguin breeding season. Two buoys placed in key locations have since disappeared and when local community representatives sought to have them replaced, NSW Fisheries Director, Steve Dunn was reported as saying that the buoys had been “mistakenly placed in an area that was a traditional and legitimate commercial fishing area and needed to be moved” (Manly Daily 9 October 2003).

Community dialogue with various agencies saw replacement of the marker buoys defining the boat exclusion zone, but they have been relocated so as not to interfere with commercial fish net hauling in the area – scarcely a satisfactory resolution of this issue, especially given that NSW Fisheries were consulted as part of the Critical Habitat declaration process.

### Long-nosed Bandicoots

Listed as Endangered in 1997, the North Head population of Long-nosed Bandicoots *Perameles nasula*, is a discrete population isolated from other populations once widespread in the Sydney region. The North Head population numbers no more than 100 animals (Banks and Powell 2002). Within this perilously small population, adults dominate slightly, and males dominate at a ratio

of almost 4:1 among juveniles (Banks and Hayward 2002), causing the authors to express concern that the population is not growing and would be highly vulnerable to a single catastrophic event.

From these same population studies, Banks has concluded that: *“the Q[uarantine] S[tation] is a core source area for the whole bandicoot population on North Head. Bandicoot numbers are consistently higher there than elsewhere on the headland, and the QS is recognised by most people who have worked in the area as the best area for bandicoots, despite its artificial nature.”* (Banks 17 Nov 2001).

Just as with the Little Penguins, the North Head population of Long-nosed Bandicoots is an iconic population on the brink of extinction, for which the *Threatened Species Conservation Act* provides little protection. Despite several years of negotiation, there is still no Recovery Plan in place for this population and Critical Habitat has not been identified.

The Mawland Hotel development proposed for the Quarantine Station will significantly increase traffic on the site, given the proponents plan to have approximately half of their clients arriving by car and the remainder arriving by ferry. The Joint Determining Authorities (Joint Determining Authorities 20 Nov 2002), assessing the development proposal, acknowledge in their opening paragraphs that: *“the determining authorities have concluded as part of this joint determination report that the activity has the potential to significantly affect the endangered Long-nosed Bandicoot and Little Penguin populations”*.

Road kill has been identified as one of the major causes of mortality in the North Head population of Long-nosed Bandicoots (Scott 1995). The Joint Determining Authorities (Joint Determining Authorities 20 Nov 2002, p.71) in their assessment of environmental issues and impacts state: *“In the case of the Long-nosed Bandicoot population, for example, the population viability analysis (Banks 2000) clearly demonstrates the need to apply extreme caution given that any additional road deaths above current background levels will increase the risk of extinction”*. However Environment Minister Debus (Joint Determining Authorities 20 Nov 2002) has given his concurrence to conditions which permit *“2 recorded adult road mortalities above background in any 6-month period”* before additional mitigating measures are required.

Concerns about the increased threat to bandicoots posed by additional vehicle movements if the ferries were required to stop at dusk were used by the Minister as a justification for not pursuing the ferry curfew recommended by the Commission of Inquiry into the Conservation and Adaptive Re-use of the North Head Quarantine Station. In the Joint Determining Authorities report (20 Nov 2002, p.71) it is clearly stated that: *“...the determining authorities do not support the recommendation of the COI to impose a blanket dusk-to-dawn curfew on the operations of the ferry service, given the subsequent impacts this could have on vehicle traffic to the site”*.

With such trade-offs between endangered populations occurring it is scarcely surprising that members of the community who have worked long and hard for the

conservation of North Head and its natural and cultural values are cynical about the effectiveness of the *Threatened Species Conservation Act 1995* when it is pitted against major tourism development on public land.

### Eastern Suburbs Banksia Scrub

One other example deserves mention in highlighting why inadequacies in implementation of the *Threatened Species Conservation Act 1995* are adding to community cynicism.

Eastern Suburbs Banksia Scrub is an ecological community listed as Endangered at both Commonwealth and State levels. Occurring on nutrient poor, ancient Aeolian dune sands, it is estimated that only 138 hectares of this once much more abundant sclerophyll heath/scrub remain, all of it in small (0.06-8.5ha) fragmented remnants (NSW NPWS March 2003). Despite its name, some of the most significant patches of Eastern Suburbs Banksia Scrub are scattered across North Head. Included among these is a small patch of 0.3 ha that has been approved for removal to enable car park construction for the Mawland Hotel development. The Aeolian dunes on North Head are limited in extent, and debate over the extent to which restoration ecology can accomplish replacement of complex ecological communities remains unresolved. Yet removal of a small area of Eastern Suburbs Banksia Scrub has been approved (Heritage Council Approvals Committee, 5 Feb 2003) to enable construction of an on-site car park, the only condition of approval being that *“habitat regeneration works on an area elsewhere on North Head up to 20 times the size of the area to be impacted”* be carried out.

The land on North Head is all public land, managed by public authorities in the public interest. Given the ongoing and acknowledged threats to endangered species and populations provided in the examples given here, members of the North Head Sanctuary Foundation, like other community members striving for conservation of threatened species, are justifiably disenchanted with the effectiveness of the relevant legislation, whether Commonwealth or State. The legislation does provide a benchmark against which government action can be measured, but the extent to which objectives of conserving threatened species and ensuring their recovery can be circumvented is substantial. That disenchantment is shared by many in Local Government, which frequently looks to State and Federal Governments to lead by example.

### So, do local communities & Local Government see threatened species legislation as simply an Act?

Yes and No. Both the Commonwealth and State legislation are seen as part good, part bad.

The community in general would be worse off, and so would the populations, species and ecological communities needing protection, if there were no such legislation in place. The legislation at least provides opportunity for community input.

But, without demonstrated political will to use the legislative provisions to protect threatened flora and fauna, those in the community who are concerned are increasingly likely to disengage with processes they see as delivering feeble outcomes. Local Government, with a plethora of other responsibilities handed down without supporting resources, may ignore the issues for as long as possible.

The answers are not simple. However scientists, local communities and Local Government must each contribute the expertise they can bring and together seize opportunities to highlight the impacts that political reticence has on our native plants, animals and the smaller species that support them. If political representatives are to

ensure that threatened species, populations and ecological communities are protected, it is important that those best able to bring local and professional expertise to the debate act as if the threatened species, ecological communities and populations they care about are their own.

At a time when governments are calling for 'partnerships' to protect many aspects of our environment, a coming together of concerned scientists, national, state and local environmental organisations, and Local Governments can and should present challenges to both State and Commonwealth Governments to make greater use of the nomination, assessment, monitoring and compliance aspects of the available legislation.

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